



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-34/50705

PRELIMINARY RECITALS

Pursuant to a petition filed September 28, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Langlade County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on December 28, 2001, at Antigo, Wisconsin. Hearings previously set for October 19 and November 27 were rescheduled at petitioner's request.

The issue for determination is whether the county agency has met its burden of explaining why it determined a divestment had occurred and how that divested amount was calculated.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Respondent:

Wisconsin Department of Health and Family Services

Division of Health Care Financing

1 West Wilson Street, Room 250

P.O. Box 309

Madison, WI 53707-0309

By: Kathy Hamilton, ESS

Langlade County Dept Of Social Services

1225 Langlade Road

Antigo, WI 54409-2795

ADMINISTRATIVE LAW JUDGE:

Kenneth P Adler

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Langlade County.
2. Petitioner and her husband previously jointly owned a primary residence valued at \$63,700.
Exhibit 5

3. On December 29, 2000 petitioner and her husband quit-claimed their residence to their four children, while reserving a life estate for each of them. That Quit Claim Deed was filed on January 4, 2001. Exhibit 6
4. During April 2001 petitioner entered a nursing home.
5. On May 8, 2001 petitioner submitted an application for nursing home MA. Petitioner requested coverage beginning May 15, 2001.
6. On May 11, 2001 the county agency issued a notice of decision stating petitioner's application for institutional MA had been approved. Exhibit 9
7. On June 4, 2001 a "Divested AG Medical Status Report" was generated indicating that petitioner had divested assets – with a divestment begin date of 01/02/01 and an end date of 05/01/01. Petitioner's MA eligibility begin date was listed as 05/01/01 – with an eligibility end date of 04/30/02. It is not clear who generated the notice. The notice was not received by petitioner or the facility where she resided. Exhibit 1
8. Petitioner was never notified by the county agency of the divestment determination or penalty period.
9. On June 18, 2001 the county agency issued another notice of decision stating petitioner continued to be eligible for institutional MA. Exhibit 10
10. On September 4, 2001 the county agency issued another notice of decision stating petitioner continued to be eligible for institutional MA. Exhibit 2
11. On some unspecified date the nursing home informed petitioner she was no longer eligible for MA due to the imposition of a divestment penalty period by the county agency.
12. The *Wisconsin Recipient Eligibility* screen updated on 09/08/01 shows petitioner certified for nursing home MA for the period 05/01/01 – 05/31/02. Exhibit 3
13. On September 28, 2001 petitioner filed a request for fair hearing regarding the divestment decision.
14. On October 2, 2001 petitioner was discharged from the nursing home to a community setting.
15. On October 5, 2001 petitioner's four children signed a Quit Claim Deed returning the property to petitioner and her husband. As of the date of hearing the Quit Claim Deed had not been recorded. Exhibit 7
16. The *Wisconsin Recipient Eligibility* screen updated on 11/09/01 shows petitioner certified for nursing home MA for the period 05/01/01 – 09/30/01 and 10/01/01. The screen was updated on 12/15/01 when petitioner's eligibility was changed to an MA waiver position and she was listed as certified for 10/02/01 – 12/31/02.

DISCUSSION

Before a negative action is taken by a county agency, the agency must mail an adequate notice of the action at least ten days before the effective date of the action. 42 C.F.R. § 431.211; Income Maintenance Manual, II-G-2.2.1. It is the responsibility of the county agency to provide a copy of this notice to demonstrate that such notice was, in fact, issued by the agency within the requisite timeframe.

In addition, it is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in Hanson stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs.

In this particular case, the county agency submitted no county summary prior to hearing. At hearing the agency simply presented Exhibits 1 and 4 and stated a divestment had been determined based upon the transfer of petitioner's homestead property. However, The agency did not present calculations establishing the amount of the divestment nor notices informing petitioner of the divestment

Based upon the above, I must conclude the county agency has failed to meet its burden of explaining why it determined a divestment had occurred and how it valued that divestment and therefore has not met its burden of going forward in this case. The county is responsible for appearing at hearing to explain how the divestment was calculated and whether petitioner was issued adequate notice of this determination. Without any information to review, it is impossible to conclude whether the county agency correctly imposed a divestment penalty period on this particular case. Therefore, the divestment must be removed and any penalty period lifted.

However, I note that it does not appear this divestment decision has, in any way, affected petitioner's MA eligibility. Nothing in the Client Assistance for Reemployment and Economic Support (CARES) system lists any notices mentioning the divestment determination. Nothing in the MA Recipient Eligibility references any divestment penalty period or other period of ineligibility.

I also note that the record does confirm petitioner and her husband deeded homestead property to their four children, while reserving a life estate in that property. However, petitioner has drafted a quit-claim deed returning the property to the couple. Previous decisions of this office have concluded that the return of divestment property cures the divestment as if the divestment never occurred. As the property in question is a homestead, it would then be an excluded asset of the couple. But at the time of the hearing petitioner had not yet *filed* the quit claim deed. Therefore, it is not valid as returning the property to petitioner and the property may remain a divested asset.

Finally, I also note that this decision does not stand for the proposition no divestment has occurred. It simply indicates the county agency failed to present any information to support its decision *at this time*. This decision does not prevent the county agency from correctly assessing the transfer of property and calculating what amount was divested, whether a divestment penalty shall be imposed, and the length of that divestment penalty. At that time the county agency must send petitioner a notice detailing those determinations and containing language informing petitioner of her right to a fair hearing to contest those determinations.

CONCLUSIONS OF LAW

1. That the county agency failed to meet its burden of going forward in explaining how the divestment was determined or the divested amount calculated.
2. That the divestment penalty period cannot be sustained at this time.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county agency with the following instructions: (1) remove any divestment determination from petitioner's case; and (2) reinstate petitioner's institutional MA eligibility effective May 15, 2001 – October 1, 2001. These actions are to be taken within ten (10) days of the date of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new

evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, , as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 11th day of
January, 2002

/sKenneth P Adler
Administrative Law Judge
Division of Hearings and Appeals
27/KPA